RES IPSA LOQUITER IN EXPLODING BOTTLE CASES

Ferrell v. Royal Crown Bottling Company of Charleston
109 S.E.2d 489 (W.Va. 1959)

Plaintiff, while shopping in a super-market, suffered injuries as a result of the explosion of a pop bottle manufactured and bottled by the defendant. The carton containing the defective bottle had been delivered to the market and placed on the shelf by the defendant's employee earlier the same day. Whereas the evidence indicated that the plaintiff did not touch the bottle, nothing was offered to show that the bottle had not been mishandled by persons other than the defendant's employee. Even though actual control of the bottle had passed from the defendant, the Supreme Court of Appeals of West Virginia rendered judgment for the plaintiff basing their decision on the doctrine of *res ipsa loquitur*.

One of the traditional requirements for the application of *res ipsa loquitur* is that the agent or instrument causing the injury be within the control or management of the defendant.[1] When this requirement is present in an accident of a type which usually does not occur in the absence of someone's negligence, a presumption or inference[2] is raised that it is more probable than not that the defendant's negligence was the proximate cause of the accident.

Historically, application of *res ipsa loquitur* to exploding bottle situations was limited by the control requirement. Under the classical interpretation, control must be physical and exclusive; adherence to this view is manifested by courts refusing to apply the doctrine to unexplained bursting bottle cases where actual control had passed from the defendant.[3] This reluctance stems from the notion that in these situations there is an enhanced possibility that the accident was a result of an intervening cause.

Because of the difficulty of proving the bottler's specific acts of negligence, the majority of courts apparently have adopted the view that con-

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[1] PROSSER, TORTS § 42, at 205 (2d ed. 1955); 9 WIGMORE, EVIDENCE § 2509 (3d ed. 1940).

[2] The majority of jurisdictions regard *res ipsa loquitur* as creating an inference of negligence which allows the plaintiff to get to the jury, but still permits a finding for the defendant even though the defendant introduces no evidence at all. Other courts attach a greater procedural importance to *res ipsa* by holding it creates a presumption of negligence of which the jury must take cognizance. Thus if the defendant fails to introduce evidence of due care, a directed verdict for the plaintiff is proper. See, PROSSER, TORTS § 43, at 211 (2d ed. 1955); 65 C.J.S. *Negligence* § 220 (3), at 996-7 (1950).

[3] Dail v. Taylor, 151 N.C. 284, 66 S.E. 135 (1909); Annot., 4 A.L.R. 1094 (1921). See Stewart v. Crystal Coca Cola Bottling Co., 50 Ariz. 60, 68 P.2d 952 (1937); Slack v. Premier-Pabst Corporation, 40 Del. 97, 5 A.2d 516 (1939); Ruffin v. Coca Cola Bottling Co., 311 Mass. 514, 42 N.E.2d 259 (1942); Wheeler v. Laurel Bottling Works, 111 Miss. 442, 71 So. 743 (1916) (bursting bottle said to be unforseen accident for which there is no liability); Seven-Up Bottling Co., Inc. v. Gretes, 182 Va. 138, 27 S.E.2d 925 (1943).

trol at the time of the negligent act satisfies the requirement.[4] The purpose of the actual control requirement is preserved by requiring an affirmative showing by the plaintiff that due care has been used by all persons handling the bottle since leaving the defendant's possession.[5] It is not necessary, however, for the plaintiff to eliminate every remote intervening possibility; only enough evidence is required to permit a finding that the accident was probably due to the defendant's original negligence.[6]

After a few early decisions that *res ipsa* was not applicable to exploding bottle cases,[7] Ohio now seems to be well in accord with the majority view.[8] Although adopting the more lenient concept of control, Ohio courts still require the plaintiff's showing of evidence excluding any probable cause of the accident except defendant's negligence.

The *Ferrell* decision may well have extremely important effects not only in West Virginia[9] but also in other jurisdictions. The court states that the doctrine of *res ipsa loquitur* may apply even though physical control has passed from the defendant "where plaintiff establishes . . . that no person was probably negligent in the handling of the bottle subsequent

[4] Some courts expressly state that control at the time of the neglient act satisfies the requirement, Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal.2d 453, 150 P.2d 436 (1944); Hoffing v. Coca Cola Bottling Co., 87 Cal. App. 2d 3 (Dist. Ct. App. 1948). Other courts reach the same result by requiring an affirmative showing by the plaintiff that all persons handling the bottle since leaving the defendant's possession have used due care, Payne v. Rome Coca Cola Bottling Co., 10 Ga. App. 762, 73 S.E. 1087 (1912); Annot., 4 A.L.R.2d 474 (1949). See Florence Coca Cola Bottling Co. v. Sullivan, 259 Ala. 56, 65 So.2d 169 (1953); Coca Cola Bottling Co. of Fort Smith v. Hicks, 215 Ark. 803, 223 S.W.2d 762 (1949); Zentz v. Coca Cola Bottling Co. of Fresno, 39 Cal.2d 436, 47 P.2d 344 (1952); Hughs v. Miami Coca Cola Bottling Co., 155 Fla. 299, 19 So.2d 862 (1944) (no recovery since no affirmative showing by plaintiff); Bradley v. Conway Springs Bottling Co., 154 Kan. 282, 118 P.2d 601 (1941); Evangelio v. Metropolitan Bottling Co., 158 N.E.2d 342 (Mass. 1959); Honea v. Coca Cola Bottling Co., 143 Tex. 272, 183 S.W.2d 968 (1944) (error to refuse offer of evidence by plaintiff that he had used due care).

[5] See generally, *supra* note 3.

[6] See Ruffin v. Coca Cola Bottling Co., *supra* note 3; Zentz v. Coca Cola Bottling Co. of Fresno, *supra* note 4.

[7] Birn v. Coca Cola Bottling Corp., 13 Ohio L. Abs. 727 (C.P. 1933). See Burger v. Renner Products Co., 2 Ohio L. Abs. 189 (Ct. App. 1924) (cork blowing out of bottle containing soft drink).

[8] Leach v. Joyce Products Co., 66 Ohio L. Abs. 296, 116 N.E.2d 834 (Ct. App. 1952); Fick v. Pilsener Brewing Co., 54 Ohio L. Abs. 97, 86 N.E.2d 616 (C.P. 1949); Tennebaum v. Pendergast, 55 Ohio L. Abs. 231, 89 N.E.2d 490 (C.P. 1948).

[9] This is the first exploding bottle case in West Virginia in which *res ipsa loquitur* is used to allow recovery. In Cunningham v. Parkersburg Coca-Cola Bottling Co., 137 W.Va. 827, 74 S.E.2d 409 (1953), where the bottom of a carton of pop gave way injuring plaintiff, the doctrine was held inapplicable. In Keefer v. Logan Coca Cola Bottling Works, 141 W.Va. 839, 93 S.E.2d 225 (1956), the doctrine was not applied because the evidence warranted an interpretation that someone other than the defendant may have mishandled the bottle. In Ferrell, the

to the delivery."[10] The evidence in fact required, however, seems to have been somewhat less than this, for the doctrine was employed even though there was "*no proof*, indeed no attempt to prove, that the bottle or the carton was probably handled or mishandled by any such person."[11] By not requiring Ferrell to make an *affirmative* showing that due care was used by all persons in handling the bottle since leaving Royal Crown, the court apparently reasons that form the mere fact of the shortness of the elapsed time between the defendant's release of control and the injury to the plaintiff, it may be presumed that there was no mishandling of the bottle or its contents by some independent agent. The burden then shifts to the defendant to show that other persons have mishandled the bottle since leaving the defendant's possession.

One of the reasons for the doctrine of *res ipsa loquitur* is the desire to relieve the plaintiff of the difficult burden of proving specific acts of negligence when this information is more accessible to the adverse party. As applied to the instant case, the defendant certainly is more likely to know what occurred during the processes of bottling, inspection and delivery than is the plaintiff. However, both parties are equally unaware of what may have happened *after* the bottle left the defendant's possession. Therefore, the extension of the doctrine to always eliminate the plaintiff's affirmative burden of showing due care in the handling of the bottle by others after leaving the bottler's possession appears unwarranted. Of course, the burden of proof should be shifted to the defendant if the circumstances are such that after taking account of the defendant's possible negligence before delivery and the possible negligence of others subsequent to delivery, it is still more probable than not that the defendant's original negligence caused the accident. The finding of such a probability may be justified in *Ferrell* since the bottle exploded the same day that it was delivered. Still this does not necessarily vindicate recognizing such a probability as part of the *res ipsa loquiter* in general. In effect such an extension makes the bottler an insurer against such accidents.[12]

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court substantiates its use of the doctrine on the basis of its application in former holdings where a contaminated article was found in the bottle, Parr v. Coca Cola Bottling Works of Charleston, 121 W.Va. 314, 3 S.E.2d 499 (1939); Blevins v. Raleigh Coca Cola Bottling Works, 121 W.Va. 427, 3 S.E.2d 627 (1939).

[10] Ferrell v. Royal Crown Bottling Company of Charleston, 109 S.E.2d 489, 490 (W.Va. 1959) (syllabus by the court).

[11] Ferrell v. Royal Crown Bottling Co. of Charleston, *supra* note 10 at 491 (emphasis added).

[12] See Judge Haymond's dissenting opinion in Ferrell v. Royal Crown Bottling Co. of Charleston, *supra* note 10, 493.
To place such a burden on bottlers seems unjust in spite of the fact that they may obtain liability insurance and spread the cost of same to their customers through higher prices. At any rate, if we are to hold bottlers as insurers, it seems it would be better to do so under an absolute liability theory rather than by a questionable extension of *res ipsa loquitur*. *cf.* 1 BUFFALO L. REV. 1, at 13. (1951-52).

The *Ferrell* court probably felt the character of the evidence eliminated the need of Ferrell's affirmative showing.[13] However, the failure of the court to fully explain this position (assuming it was the basis of their decision) may have important repercussions, for a court could reasonably interpret the *Ferrell* decision as eliminating the plaintiff's affirmative burden in all situations. In any event, the acceptance of this extension will be determined by two factors: the notion in some jurisdictions that *res ipsa* must be freely applied because of plaintiff's difficulty of proving the defendant's specific acts of negligence,[14] and the view in others that the doctrine has already too much usurped the traditional burden of proof in negligent actions.

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[13] Ferrell v. Royal Crown Bottling Co. of Charleston, *supra* note 10, at 493. *Cf.* Bradley v. Conway Springs Bottling Co., *supra* note 4 where bottle had only been out of control of defendant for a short time, recovery was allowed only after the plaintiff showed due care.

[14] Ybarra v. Spangard, 25 Cal.2d. 486, 154 P.2d 687 (1944) (*res ipsa* applicable for injuries received by plaintiff during surgery even though plaintiff could not designate actual defendant or insrtument which caused the injury); Furr v. McGrath, 340 P.2d 243 (Okl. 1959) (while working on plaintiff's car, jack slipped out from under the auto injuring the plaintiff—*res ipsa* held applicable since it was virtually impossible for plaintiff to show what actually had happened).